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# MEMORANDUM

ON THE

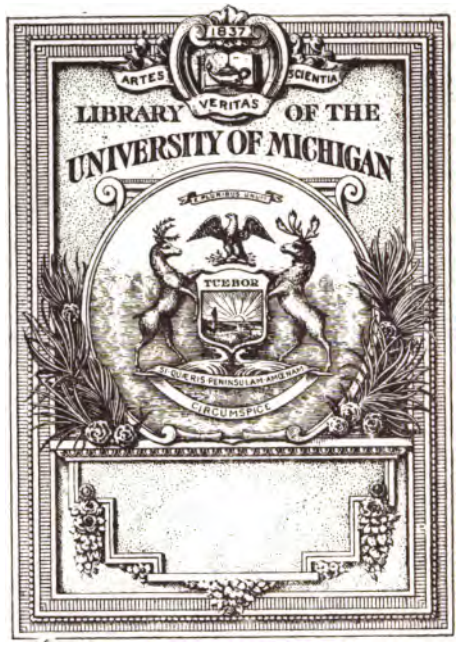
# HISTORY AND SCOPE OF THE LAWS PROHIBITING CORRESPONDENCE WITH A FOREIGN GOVERNMENT, AND ACCEPTANCE OF A COMMISSION TO SERVE A FOREIGN STATE IN WAR

SECTIONS 5 AND 9, FEDERAL PENAL CODE

*By*

CHARLES WARREN
ASSISTANT ATTORNEY GENERAL

WASHINGTON
GOVERNMENT PRINTING OFFICE
1915

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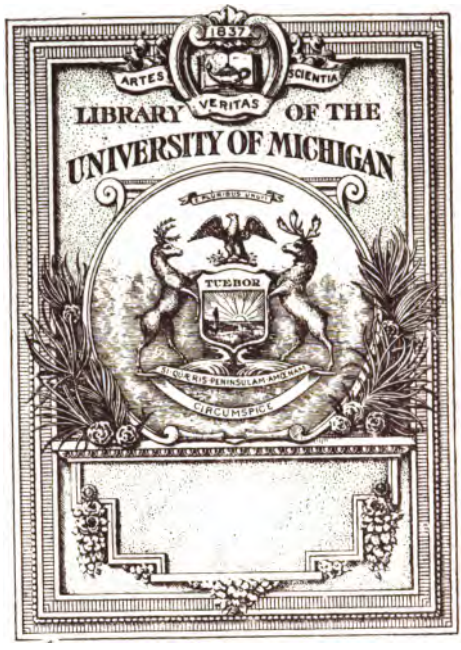


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# HISTORY AND SCOPE OF SECTION 5 OF THE FEDERAL PENAL CODE.

SECTION 5. Every citizen of the United States, whether actually resident or abiding within the same, or in any place subject to the jurisdiction thereof, or in any foreign country,[1] without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign Government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, counsels, advises, or assists in any such correspondence with such intent, shall be fined not more than five thousand dollars and imprisoned not more than three years; but nothing in this section shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

## GENERAL CONSIDERATIONS.

The original act, reproduced in Section 5 of the Federal Penal Code (35 Stat. 1088, c. 321, section 5, formerly Rev. Stat. section 5335) is the Act of January 30, 1799 (1 Stat. 613). There have been no substantial changes except that the words " or in any place subject to the jurisdiction thereof," have been twice inserted.

The statute has never been construed in any reported case. It is cited in *United States* v. *Craig* (1886) 28 Fed. 795, 801, as an illustration of the power of the United States to punish its own citizens for acts committed in a foreign country. It is also cited in *American Banana Co.* v. *United Fruit Co.* (1909) 213 U. S. 347, 356.

> "They [civilized countries] go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of

[1] The word " who," which appeared in Revised Statutes, sec. 5335, has been, by oversight, omitted when that section was embodied in sec. 5 of the Act of March 4, 1909, ch. 321, now termed the Federal Penal Code of 1910.

pirates on the high seas. *In cases immediately affecting national interests* they may go further still and may make, and if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat., Section 5335."

History, therefore, must throw the chief light upon the meaning of the statute. While Congressional debates are not determinative of the meaning of statutory language, they are unquestionably of great aid in ascertaining the history of the period and the chief causes which led to the legislation.

As was said in *Standard Oil Co.* v. *United States* (1911), 221 U. S., 1, 50:

"The debates * * * show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of times. * * *

"Although debates may not be used as a means for interpreting a statute (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 318 and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

Moreover, as the Supreme Court has not hesitated to have recourse to the debates in the Constitutional Convention of 1787 in order to ascertain the construction of words and phrases in the Constitution, the general rule as to statutes laid down above may be somewhat relaxed when the Congressional debates in question occurred over a hundred years ago and only twelve years after 1787, and in a time which has now become historical. Debates so long removed from present times and among men of historical eminence may be valuable aids towards the ascertainment of the purport and purpose of the legislation discussed.

### OCCASION FOR THE ENACTMENT OF THE ACT OF 1799.

The immediate cause of the passage of the Act of 1799 was the intermeddling of a private citizen, Dr. George Logan, in negotiations pending in 1798 between the United States and France.

President Adams, in 1797, had sent John Marshall, Charles C. Pinckney and Elbridge Gerry as special envoys to France to negotiate and settle, if possible, all claims and causes of differences which then existed between the French Directory and the United States. From this mission arose the X Y Z letters controversy, the failure of the envoys, increased Anti-France feeling in the United States,

warlike preparation in Congress, stringent measures against aliens. The envoys, one by one, returned, having accomplished nothing. Thereupon, Logan, a benevolent Quaker of Pennsylvania, undertook to act upon his own account. Bearing letters of introduction from Jefferson, Thomas McKean and others, he sailed for France, moved to do what the three envoys had failed to do. In France "he was hailed by the newspapers as the envoy of peace, was dined and feasted by Merlin (the new President of the Directory), received by Talleyrand, and came home to Philadelphia in November, with some copies of old letters to the Consul General and the verbal assurance that France would negotiate for peace." (*McMaster's History of the United States*, Vol. 4, pp. 368–410.)

While this errand had been sincerely intended, and probably without any partisan political motive, Logan was denounced by the Federalists during his absence, and after his return, as a treasonable envoy of the Republican party, carrying on a traitorous correspondence between the American and the French "Jacobins." On his return, he was coldly received by the Secretary of State, and even more coldly by Ex-President Washington, who regarded his action as fatal intermeddling. Federalists, in general, condemned him; and it was resolved that such interference should be forbidden in the future.[1] President Adams wrote to Timothy Pickering, Secretary of State, November 2, 1798 (*Life and Works of John Adams*, Vol. VIII, p. 615):

"The object of Logan, in his embassy, seems to have been to do or obtain something which might give opportunity for the 'true American character to blaze forth in the approaching elections.' Is this constitutional for a party of opposition to send embassies to foreign nations to obtain their interference in elections?"

In his message to Congress, in December, 1798, the President, while dealing chiefly with relations with France, made no reference to Logan. The address of the Senate to the President, December 11, 1798, however, contained references to professions made by France "neglecting and passing by the constitutional and authorized agents of the Government" and "made through the medium of individuals without public character or authority." The President in his reply to the Senate, December 12, 1798, said (*Messages and Papers of the Presidents*, Vol. I, pp. 276, 277):

"Although the officious interference of individuals without public character or authority is not entitled to any credit, yet it deserves

[1] References to Logan's mission and the consequent legislation are also to be found in *Writings of Thomas Jefferson*, Vol. VII, letter of June 21, 1798, p. 273; January 16, 1799, p. 161; January 26, 1799, p. 326; January 29, 1799, pp. 338, 339.

*Writings of Washington*, Vol. XI, pp. 384, 388. See also *Schouler's History of the United States*, Vol. I, pp. 415, 417. *Hildreth's History of the United States*, Vol. II, p. 265.

to be considered whether that temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States, whether by their secret correspondence or otherwise, and intended to impose upon the people and separate them from their Government, ought not to be inquired into and corrected."

LEGISLATIVE HISTORY AND PURPOSES OF THE ACT OF 1799.

The history and purposes of the Act of 1799 are fully set forth in *Annals of Congress*, 5th Congress, 1797–1799, Volumes I and III, at the pages cited, *infra*.

The questions involved in the Act were first presented in a resolution introduced in the House of Representatives, December 26, 1798 (p. 2488), by Roger Griswold of Connecticut, as a proposal to amend the Sedition Law. He said:

"Its object is to punish a crime which goes to the destruction of the Executive power of the Government—that description of crime which arises from an interference of individual citizens in the negotiations of our Executive with foreign Governments."

The resolution was as follows:

"*Resolved*, That a committee be appointed to inquire into the expediency of amending the act entitled 'An act in addition to the act for the punishment of certain crimes against the United States,' so far as to extend the penalties, if need be, to all persons, citizens of the United States, who shall usurp the Executive authority of this Government, by commencing or carrying on any correspondence with the Governments of any foreign Prince or State, relating to controversies or disputes which do or shall exist between such Prince or State and the United States."

The resolution was debated December 27, 28, 1798 (pp. 2493 et seq.) by Congressmen of great eminence, Griswold, John Rutledge of South Carolina, Albert Gallatin of Pennsylvania, Thomas Pinckney of South Carolina, Robert Goodloe Harper of Maryland, Harrison Gray Otis of Massachusetts, John Nicholas of Virginia, Abraham Baldwin of Georgia, John Williams of New York, Nathaniel Smith of Connecticut, Nathaniel Macon of North Carolina.

Griswold said that the object of the resolution was "of first importance"—

"I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries. The present situation of Europe, in my opinion, calls aloud for a resolution of this kind. . . . If offences of this kind are to pass unpunished, it may be in the power of an individual to frustrate all the designs of the Executive. The agent of a faction, if such a faction shall exist, may be sent to a foreign country to negotiate in behalf of that faction, in opposition to the Executive

authority, and will any one say that such an offence ought not severely to be punished? It certainly ought. . . . no gentleman would pretend to say that an unauthorized individual ought to exercise a power which should influence the measures of a foreign Government with respect to this country. This power has been delegated by the Constitution to the President, and the people of this country might as well meet and legislate for us, or erect themselves into a judicial tribunal, in place of the established Judiciary, as that any individual, or set of persons, should take upon him or themselves this power, vested in the Executive. Such practices would be destructive to the principles of our Government."

Rutledge said that: "if the citizens of this country shall be permitted to have intercourse with foreign Governments, they may do the greatest injury to this country under what they conceive to be the best intentions," and he stated that he thought this "a good measure of national defence."

Dana said that a person thus employed "must be considered as acting in direct hostility with the authority of our Government and against the general character of our country. . . . It is a crime of severe magnitude, as the person thus acting must be considered as the agent of a faction waiting only for an opportunity of joining the enemies of their country."

Pinckney said that it was a leading doctrine of Republican Government that "no one can pretend to interfere so as to counteract the proceedings of the people of their country as expressed by its legal organs." He stated that he "knew of no case, no situation on which it would be lawful or right for an individual to interfere with a foreign Government at a time when any negotiation is going forward by legal authority. Such an interference can have but a bad effect; it may have a very bad effect. It shows, at least, that there is a party in the country divided from the Government who take upon themselves a separate negotiation, and set up a distinct power, which they wish to be paramount to the legal authority."

Harper said:

"The principle once admitted must go to the utter subversion of Government—the principle being, that whenever an individual, or, by stronger reason, a number of individuals conceive themselves wiser than the Government, more able to discern or more willing to pursue, the interest of the country, they may assume its functions, counteract its views and interfere in its most important operations. . . . Upon this pretence, if this principle be once established, any discontented faction, under the name of a club, or patriotic society, or revolution society . . . may usurp the most essential functions of Government in their own country, negotiate on all sorts

of subjects with the Governments of other countries, and open a direct and broad road for the entrance of that foreign influence which, with equal and force, has been declared as the 'Angel of Destruction to Republican Governments.' . . . When we knew that that (foreign) Government openly avows its determination to encourage such intercourse, to protect all factions, all malcontents, all insurgents in all countries, when we knew that this intercourse and her consequent protection of domestic factions are the great engines of her foreign policies—when we know all this, shall we not oppose an effectual barrier?"

The resolution was passed, 65—23, (p. 2545), and Griswold, Pinckney, Baldwin, Bayard and Spaight were appointed a committee.

A bill based on the resolution was introduced in the House by Mr. Griswold, January 7, 1799, as follows (pp. 2565, 2583):

"*Be it enacted, &c.*, That if any person, being a citizen of the United States, whether he be actually resident or abiding within the United States, or in any foreign country, shall, without the permission or authority of the Government of the United States, directly or indirectly, commence or carry on any verbal or written correspondence or intercourse with any foreign Government, or any officer or agent thereof, relating to any dispute or controversy between any foreign Government and the United States, with an intent to influence the measures or conduct of the Government having disputes or controversies with the United States, as aforesaid; or of any person, being a citizen of, or resident within, the United States, and not duly authorized, shall counsel, advise, aid or assist, in any such correspondence, with intent as aforesaid, he or they shall be deemed guilty of a high misdemeanor; and, on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding ——— thousand dollars, and by imprisonment during a term not less than ——— months, nor exceeding ——— years."

The bill was debated at length under the heading of "Usurpation of Executive Authority," from January 9 to January 17, 1799 (pp. 2583 et seq.), by many eminent Congressmen in addition to those already speaking on the resolution—James A. Bayard of Delaware, Jonathan Dayton of New Jersey, Carter B. Harrison of Virginia, William C. Claiborne of Tennessee, Thomas Claiborne of Virginia, Isaac Parker of Massachusetts, Edward Livingston of New York, Joseph McDowell, John Dennis, Jonathan Brace, Samuel Smith, Samuel Sewall, John Dawson, Josiah Parker, William Gordon, Joseph Eggleston, George Thatcher, John Allen, William Edmond, and others.

The principal opposition came from Albert Gallatin and Edward Livingston, and was largely based on an unfounded fear that the

bill would prevent private individuals corresponding in regard to their private and personal affairs.

Gallatin argued (p. 2586):

"All cases where a change of the measures of Government was attempted, though it were done merely by an individual to secure his private rights, would come within the meaning of this bill. Thus, if an individual, whose vessel is taken by the French should, after his vessel is carried into one of their ports, remonstrate or enter into a correspondence with any of the agents of that Government, he must do it in such a manner as that his arguments shall not involve any of the general principles in dispute between the two Governments; because the moment he does this, he falls within the penalties of the bill. It appeared extremely difficult, that an individual, who is not only perhaps concerned for himself, but an agent for others, should be able to make any effectual application to the French Government, without taking into consideration, in some respect the principles of dispute between the two Governments."

He wished the bill amended so as to exclude this.

Otis said in reply that the words, "with an intent to influence the measures of a foreign Government," must relate to general public measures, not to the concerns of any individual.

A motion was made to insert in place of "as follows," the words "so as to prevent or impede the amicable adjustment of said disputes or controversies."

Bayard said: "If this amendment were to pass, a person might carry on any correspondence whatever, and no punishment could be inflicted upon him, unless a bad intention was proved."

"The object of the law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only. An individual may do good, but he may also do evil, and it cannot be supposed that any private person has more wisdom or greater desire to serve his country than the Executive of the United States."

The amendment was lost 51—33, and on being reviewed was again lost 51—35. Later in the debate, Gallatin, supported by Nicholas, moved to add the following provisio (p. 2591):

"*Provided*, That nothing in this act contained shall be construed to extend to any person who shall apply to any foreign Government, or to any officer or agent thereof, for the purpose of obtaining either the releasement of American seamen, or for the restoration of any property belonging to citizens of the United States, and captured, sequestered, or detained, by or under the authority of any such foreign Government or any of its officers or agents, or for the payment of any debts due by such Government to the citizens of the United States."

Bayard opposed, saying the bill was not intended to apply to such case and there was no need of the proviso:

"In order to establish a crime by this bill, what is to be proved? First, that there are disputes subsisting between the United States and the foreign nation with whom the correspondence is said to have taken place; that this intercourse has really existed; and that it was carried on with a view to influence the measures or conduct of the foreign Government in relation to any disputes or controversies with the United States; and unless all these facts are proved, the crime is not made out. The intention must be proved before the crime will appear."

Dana said that "the disputes and controversies mentioned in this bill are those which exist between the Government of the United States and foreign Governments—disputes and controversies of a political nature, unconnected with individual claims."

Edmond said: "It will be wise and prudent at this time to frame a law to prevent individuals from interfering with the Executive authority in a manner injurious to the community."

The proviso was defeated 48—37.

A motion to add after the word "influence" the words "or defeat" was made by Joseph Parker (p. 2588), saying that he wished "to make the bill as complete as possible and to put every check upon individual interference with foreign negotiations, which the Government had in its power to do so."

The amendment was voted 48—30.

Dayton proposed an amendment to strike out the words "relating to any dispute or controversy between any foreign country and the United States," and also the word "having" and the words "as aforesaid," and to insert in place of "having" the words "in relation to any."

These amendments were voted.

Further statements as to the purpose and intent of the bill were made in the debates on January 10, 1799 (pp. 2599), January 11, 1799 (pp. 2626, 2648), January 16 (pp. 2677, 2682), January 17 (pp. 2686, 2721).

Bayard said: "The offence proposed to be punished by this law is separated only by a shade from treason." Referring to the particular action of Dr. Logan, out of which the bill arose, he said: "It must be clear to every reasonable man that a law of this kind is a necessary barrier to guard against an arrogation of power in public factions. The bill is founded on justice and policy."

Griswold said that the object of the bill was perfectly well known and understood, "to prevent all interference with the Executive power in our foreign intercourse."

Pinckney said that a grave evil existed which it was wise for all nations to prepare against:

"This evil is no less than an endeavor on the part of one Government, by means of its diplomatic skill, to overset all the Governments which do not concur with them in its mad career. It is become necessary, therefore, for us, in common with other nations, to guard against this evil, and to oppose it by such barriers as are within our power. Upon this footing, the bill now before the House might be justified, if no inconveniences had already been experienced which make such a law necessary. . . . If an individual goes forward to a foreign Government to negotiate on national concerns, any sensible Government must either laugh at such a man as mad or conclude that he is the agent of a deep rooted party opposed to the Government of the country from which he comes. And certainly no individual ought to be permitted to do an act with impunity which might throw so great a contempt upon the Government of his country."

Harper said:

"It was this intent which constituted the essence of the offence; an intent to interfere in the political relations of this country with foreign nations, or to defeat the measures of our own Government. . . . It is this interference, this intermeddling, and not an accidental conversation, which the bill forbids. The bill includes, in order to constitute the offence required, that the act should be done with an intent to interfere with the functions of Government, and intermeddle with the political relations of the two countries."

Brace said:

"The bill proposes to punish any person who shall interfere in any controversy or dispute between the Government and any of these foreign Governments. . . . Indeed, this is a part of our defence which is above all others necessary, as it will defend us against foreign intrigue, against what has already brought upon this country great calamities and involved many others in irretrievable ruin. This crime is of all others of the deepest dye. . . . The evil of an offence of this kind is that it involves a whole nation, and puts at hazard everything we hold dear."

Rutledge said "that in all well constituted Governments it is a fundamental principle that the Government should possess exclusively the power of carrying on foreign relations."

Isaac Parker said that "this bill is founded on the principle that the people of the United States have given to the Executive Department the power to negotiate with foreign Governments and to carry on all foreign relations, and that it is therefore an usurpation of that power for an individual to undertake to correspond with any foreign power on any dispute between the two Governments."

Various motions to amend the bill in unessential ways, including a motion to limit its operation to one year, were made and defeated (pp. 2679–2682); and the bill was finally passed in the House of Representatives January 17, 1799, by a vote of 58 to 36 (p. 2686).

The bill was introduced in the Senate, and passed on January 25, 1799, by a vote of 18 to 2. It was signed and became a law, January 30, 1799 (1 Stat. 613).

THE ELEMENTS OF THE CRIME.

The actions made criminal by the statute fall into two classes: (1) Those performed by United States citizens wherever resident or abiding; (2) those performed by a person resident in the United States, whether alien or citizen.

(1) The actions forbidden to United States citizens are:

(*a*) Without the permission or authority of the Government,

(*b*) directly or indirectly,

(*c*) to commence or carry on any verbal or written correspondence or intercourse, with any foreign Government or any officer or agent thereof,

OR

(*d*) to counsel, advise or assist in any "such correspondence," i. e., in any verbal or written correspondence by a United States citizen with any foreign Government or any officer or agent thereof,

(*e*) with an intent to influence the measures or conduct of any foreign Government or any officer or agent thereof in relation to any disputes or controversies with the United States,

OR

(*f*) with an intent to defeat the measures of the Government of the United States.

(2) The actions forbidden to persons resident within the United States, whether alien or citizen, are: to counsel, advise or assist in the verbal or written correspondence, or intercourse made criminal as above, with the intent designated as above.

The dictionaries in vogue in or about 1799 define the phrase "to carry on," used in the statute, as follows:

*Johnson's Dictionary of the English Language* (London, 1755, Todd's Ed., 1818):

To carry on: To promote; to help forward;
To continue; to put forward from one stage to another;
To prosecute; not to let cease.

*Sheridan's English Dictionary* (London, 1790):

*Walker's Dictionary of the English Language* (London, 1791):

To carry on: To promote; to help forward.

*Webster's American Dictionary* (1828):

Carry on: To promote, advance, or help forward; to continue; as to *carry on* a design; to *carry on* the administration of grace;

2. To manage or prosecute; as, to *carry on* husbandry;
3. To prosecute, continue or pursue; as, to *carry on* trade or war.

Similar dictionaries define the words "correspondence" and "intercourse" as follows:

*Sheridan's English Dictionary* (London, 1797):

*Walker's Dictionary of the English Language* (London, 1791):

Correspondence: Intercourse, reciprocal intelligence;

Intercourse: Commerce, exchange, communication.

*Dyche's English Dictionary* (London, 1794):

Correspondence: Intercourse by letter or otherwise;

Intercourse: Commerce, exchange, mutual communication.

*Entick's New Spelling Dictionary* (London, 1791):

Correspondence: Agreement, fitness, intercourse;

Intercourse: Communication, commerce, trade.

*Johnson's Dictionary of the English Language* (London, 1755):

Correspondence: (2) Intercourse, reciprocal intelligence.

Intercourse: (1) Commerce, exchange (2) communication.

*Kersey's English Dictionary* (London, 1721):

Correspondence: Holding intelligence, intercourse, mutual commerce.

Intercourse: Mutual commerce, traffic or correspondence.

*Marchant's New English Dictionary* (London, 1760):

Correspondence: Intercourse, reciprocal intelligence.

Intercourse: Commerce, communication, free and mutual correspondence between persons.

From the above it would appear that the words "correspondence" and "intercourse" were interchangeable or synonymous. "Correspondence" is evidently used in the statute in the sense of "general communication or intercourse with," and cannot be limited to the technical sense of "communication by letter" inasmuch as it is preceded in the statute by the words "*verbal* or written."

Proof of intent is, of course, an essential element of the crime. Intent is to be determined from the facts, circumstances and surroundings at the time of the transaction and from the defendant's prior course of dealing. If the natural and probable result of commencing or carrying on the correspondence or intercourse in question or assisting therein would be the influencing of a foreign Government or its officials or would be the defeat of measures of the United States Government, then the law presumes that the perso so acting intended so to influence or defeat. In other words, th

is a presumption of law that a person intends the natural and probable consequence of acts knowingly done by him.

See in general:

*Reynolds* v. *United States* (1878) 98 U. S. 145, 167;

*Allen* v. *United States* (1896) 164 U. S. 492, 496;

*Agnew* v. *United States* (1897) 165 U. S. 36, 50, 53;

*United States* v. *Quincy* (1832) 6 Peters 445, 467; 11 L. R. A. Note p. 810.

"Any officer or agent" of "any foreign Government" is a broad term and clearly includes diplomatic and consular officers located in the United States, so that intercourse or correspondence with them in the United States by a United States citizen, if for the purpose and with the intent prescribed by the statute, is forbidden.

The only other phrase in the statute about which any question is likely to arise is the scope of the phrase "in relation to any disputes or controversies with the United States."

Consideration of the history and general purposes of the statute makes it clear that this phrase refers to all questions which are at the time the subject of diplomatic or official correspondence or negotiation between the United States and the foreign country.

### GENERAL OBJECT OF THE STATUTE.

Under the Constitution, Article II, Section 23, the President has the power (by and with the advice and consent of the Senate) to "appoint ambassadors and other public ministers and consuls" and "shall receive ambassadors and other public ministers."

By the Act of July 27, 1789, c. 4 (1 Stat. 28) it was provided that—"there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs,[1] who shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs, as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."

[1] By the Act of September 15, 1789, ch. 14 (1 Stat. 68), the name of the Department of Foreign Affairs was changed to that of the Department of State. These statutes are embodied in the Revised Statutes, sec. 202.

These functions of the President with reference to foreign nations were stated by Jefferson to Genet, the French minister, in a letter November 22, 1793, as follows: "He [the President] being the only channel of communication between this country and foreign nations or their agents, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation."

The Executive, therefore, is the head of the Government, especially "charged with our foreign relations," and their conduct. See *Williams* v. *Suffolk Insurance Co.* (1839) 13 Peters 415, 420, in which case it was so held, and the President's decisions as "to what sovereignty any island or country belongs" was held to be "in the exercise of his constitutional functions," and "under the responsibilities which belong to him."

It is highly important to the welfare of the country that there shall be no interference with the President's constitutional and statutory functions, and especially no attempt to influence or intermeddle in official foreign negotiations carried on by him, through private negotiations with foreign officials in relation to the same subject matter. In foreign negotiation, the President must speak for the people of this country. Private individuals cannot be allowed to open negotiations which might have the effect of inducing or promoting in the foreign country views as to discord or faction in this country.

The influencing of a foreign nation by correspondence with foreign officials upon a question in dispute between it and the United States, or upon a measure of the United States is a function which should be possessed solely by the Government, and which a private citizen ought not to be allowed to assume.

# HISTORY AND SCOPE OF SECTION 9 OF THE FEDERAL PENAL CODE.

SECTION 9. Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years.

## GENERAL CONSIDERATIONS.

A question has been presented as to the meaning of the word "commission" in Federal Penal Code, section 9 (formerly Rev. Stat. section 5281). A review of the history and purpose of the statute will clearly show that it was intended to apply primarily to the acceptance and exercise by United States citizens of commissions to serve a foreign belligerent nation in some military or naval capacity; and that it can not legally be applied to any service other than in some office formally created by the foreign government and required to be evidenced by the official warrant termed a "commission."

The original act reproduced in this section 9 is section 1 of the act of June 5, 1794 (1 Stat. 381), the necessity for the passage of which arose from the following series of events.

On the outbreak of the war between France and England in 1793 Washington wrote from Mount Vernon to each member of his Cabinet, April 12, 1793, that "it behooves the government of this country to use every means in its power to prevent the citizens thereof from embroiling us with either of these powers by endeavoring to maintain a strict neutrality. I therefore require that you will give the subject matter mature consideration that such measures as shall be deemed most likely to effect this desirable purpose may be adopted without delay;"[1] and he called a Cabinet meeting for April 19 at his house in Philadelphia, submitting thirteen questions for consideration. At this meeting, the famous so-called "Neutrality Proclamation," drafted by the Attorney General, Edmund Randolph ("badly drawn," as Jefferson wrote), was determined upon, and

[1] The letters and documents referred to in this memorandum will be found in *The Writings of George Washington* (Ford's Ed., 1891), vol. 12; *The Writings of Thomas Jefferson* (Ford's Ed., 1895), vols. 1, 6; *The Correspondence and Public Papers of John Jay* (1891), vol. 3; *The Works of Alexander Hamilton* (1861), vol. 2; *American State Papers, Foreign Relations*, vol. 1.

issued, April 22, in which it was stated that the "duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward belligerent powers"; and it warned all citizens "carefully to avoid all acts and proceedings whatsoever which may in any manner tend to contravene such dispositions," and not to violate the law of nations, under penalty of prosecution.

While always termed a "Neutrality Proclamation," the word "neutrality" was omitted from it by express purpose, in order to avoid committing the Cabinet to the position that the President had power to declare that there should be no war—Jefferson especially having opposed the use of the word. (See *Writings of Thomas Jefferson*, Vol. VI, letters of June 23, 29, July 14, Aug. 11, 1793.) Its purpose was therefore not to serve as an announcement of the political status of the United States, but rather to require such line of action on the part of its citizens as would prevent international complications. In a series of letters signed "Pacificus," in June and July, 1793, Hamilton defended the proclamation on the very ground that: "Its main object is to prevent the nation's being responsible for acts done by its citizens, without the privity or connivance of the government, in contravention of the principle of neutrality; an object of the greatest moment to a country whose true interest lies in the preservation of peace;" and later he stated in a draft for the President's Annual Address to Congress, "it was probable that designing or inconsiderate persons among ourselves might from different motives embark in enterprises contrary to the duties of a nation at peace with nations at war with each other . . . and of course calculated to invite and to produce reprisals and hostilities."

The actions of the new French Minister Genet, and of United States citizens favoring the French cause, soon showed the necessity for the warning conveyed by the Proclamation and for preventive or punitive action on the part of the United States.

These actions, which were deemed violative of the laws of nations as to the obligations of a neutral power, fell, in general, into five classes:

(*a*) The fitting out and equipping in our ports of American and French privateers;

(*b*) The holding of prize courts in this country by French consuls;

(*c*) The enlisting of American citizens by the French minister;

(*d*) The issue of commissions by the French minister to commanders of privateers, both French and American;

(*e*) The issue of commissions by the French minister to persons to serve as military officers to conduct hostilities against nations with which the United States were at peace.

The last two classes of acts were those to prevent which the Congressional legislation in question was directed.

As early as May 15, 1793, Jefferson (Secretary of State) wrote to the French minister: "Our information is not perfect on the subject matter of another of these memorials which states that a vessel has been fitted out at Charleston, manned there, and partly too with citizens of the United States, *received a commission* there to cruise against nations at peace with us, and has taken and sent a British vessel into this port. Without taking all these facts for granted, we have not hesitated to express our highest disapprobation of the conduct of any of our citizens who may personally engage in committing hostilities at sea against any of the nations parties to the present war; to declare that, if the case has happened, or that it should happen, we will exert all the means with which the law and Constitution have armed us, to discover such offenders and bring them to condign punishment."

To this, Genet answered, May 27, that he "believed no law existed which could deprive French citizens in the ports of the United States of the privilege of putting their vessels in a state of defence, *of taking, in time of war, new commissions*, and of serving their country by causing them to cruise out of the United States, on the vessels of their enemy." Jefferson replied, June 5, 1793: ". . . *the granting military commissions* within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe their own country."

To this, Genet retorted, June 8: "At all times, *like commissions, during a war*, have been delivered to our vessels. The officers of the marine transmit them to them, in France, and the consuls, in foreign countries; and it is in virtue of this usage, which no power has ever thought of regarding as an act of sovereignty, that the executive council has sent here such commissions. . . . It results from this note, . . . that the commissions transmitted in virtue of the Executive Council of the Republic of France to the French vessels in the ports of the United States are merely an authority to arm themselves, founded upon the natural right and usage of France, that these commissions have been expedited at all times, in the like circumstances; that their distribution can not be considered but as an act of consular administration, and not of sovereignty."

In a subsequent letter of June 17, referring to another infraction of neutrality, Jefferson wrote that it was "a repetition of that which was the subject of my letter of the 5th instant which animadverted not merely on the single fact of *the granting commissions of war* by one nation within the territory of another, but on the aggregate of the facts."

The questions relating to neutrality became so numerous and serious that, after consideration at a Cabinet meeting between July 12 and 18, the President resolved to ask the Justices of the Supreme Court to express their opinions on a list of 21 questions drafted by Hamilton, to which Jefferson added 8 more. The letter to the Court, July 18, drafted by Jefferson, was as follows:

"The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, & of greater importance to the peace of the U. S. These questions depend for their solution on the construction of our treaties, on the laws of nature & nations, & on the laws of the land; and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the Executive, as to occasion much embarrassment & difficulty to them. The President would therefore be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the Supreme court of the U. S. whose knowledge of the subject would secure us against errors dangerous to the peace of the U. S. and their authority ensure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, Whether the public may, with propriety, be availed of their advice on these questions? and if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion forbid them to pronounce on."

To this, the Justices replied, July 20, that they felt a reluctance to decide in the absence of some of their number, but saying:

"We are pleased, sir, with every opportunity of manifesting our respect for you, and are solicitous to do whatever may be in our power to render your administration as easy and agreeable to yourself as it is to our country. If circumstances should forbid further delay, we will immediately resume the consideration of the question, and decide it."

Washington wrote again, July 23, stating that he did not desire to press the Court, but that the circumstances which had induced him to ask their counsel still existed, and on August 8, the Justices replied:

"We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being

judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly limited to the *executive* departments.

"We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States."

Jefferson had written to Madison, August 3, that the judges "will not agree, I believe, to give opinions," and, on August 11, that "I mentioned to you that we had convened the judges to consult them on the questions which have arisen on the law of nations. They declined being consulted. In England, you know, such questions are referred regularly to the Judge of Admiralty. I asked E. R. [Edmund Randolph, Attorney General] if we could not prepare a bill for Congress to appoint a board or some other body of advice for the Executive on such questions. He said he should propose to annex it to his office. In plain language, this would be to make him the arbiter of the line of conduct for the United States towards foreign nations."

Meanwhile the question had arisen in the Federal courts whether, in the absence of any statute, persons could be punished who offended against the laws of nations, particularly in engaging in privateering or enlisting against countries with which the United States were at peace. The first case was that of the indictment in the Circuit Court in Philadelphia on July 27, 1793, of Gideon Henfield, who had served as a prize-master, an officer of a privateer fitted out in Charleston under a commission issued from France.[1] The case was prosecuted by the Attorney General, Randolph, and United States Attorney William Rawle, against Pierre Duponceau, Jared Ingersoll, and John Sergeant. The court, consisting of two Justices of the Supreme Court—Wilson and Iredell, and District Judge Peters—charged the jury that "the acts of hostility committed . . . are an offence against this country and punishable by its laws," being in violation of the laws of nations and of existing treaties, and in spite of the absence of any statute making the acts penal. A similar doctrine had been upheld by Chief Justice Jay in a charge to the Grand Jury in the preceding May.

Considerable doubt was felt in the United States as to the validity of this decision; and the desirability of legislative action by Congress became evident. Jefferson, as early as July 14, 1793, wrote to Monroe that: "I confess I think myself that the case is punishable

[1] For form of the commissions issued, see *Wharton's State Trials*, p. 51, note.

and that, if found otherwise, Congress ought to make it so, or we shall be made parties in every maritime war in which the piratical spirit of the banditti in our ports can engage."

The actions of the French Minister and Consuls still continued; and the Cabinet finally determined to write to our Minister in France, Gouverneur Morris, to lay the matter before the French Government and suggest recall. In his letter to Morris of August 16, 1793, Jefferson referred to Genet, who "arms vessels, levies men, *gives commissions of war* . . . when they [the Government] forbid vessels to be fitted in their ports for cruising on nations with whom they are at peace, he commissions them to fit and cruise," and stated further: "Mr. Genet asserts his right of arming in our ports and of enlisting our citizens and that we have no right to restrain him or punish them. Examining this question under the law of nations, founded on the general sense and usage of mankind, we have produced proof from the most enlightened and approved writers on the subject that . . . the right of raising troops being one of the rights of sovereignty, and appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent; and he who does may be rightfully and severely punished; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments . . . we hold it certain that the law of nations and the rules of neutrality forbid our permitting either party to arm in our ports."

On September 7, 1793, Jefferson issued a circular to French consuls in the United States, stating that as it appeared from their advertisements in the public papers that "they are undertaking *to give commissions* within the United States and to enlist or encourage the enlistment of men, natives or inhabitants of these States, to commit hostilities on nations with whom the United States are at peace, in direct opposition to the law of the land," the President would revoke the exequatur of any consul committing any such act.

Genet did not confine his activities, however, to the granting of commissions to commanders of privateers. He actively organized on United States soil military expeditions against Spanish and English possessions and granted commissions to United States citizens to act as officers on these expeditions and on other expeditions to be organized on foreign soil.

As early as July 5, 1793, Jefferson records in his *Anas* a conversation with Genet as to a proposal "that *officers shall be commissioned by himself* in Kentucky and Louisiana, that they shall rendezvous out of the territories of the U. S. . . . to undertake the expedition against New Orleans." . . . "I told him that his enticing officers

and souldiers from Kentucky to go against Spain was really putting a halter about their necks, for that they would assuredly be hung if they commenced hostilities against a nation at peace with the U. S."

Under these conditions, when Congress assembled December 3, 1793, President Washington in his address laid before it his "Neutrality Proclamation," the regulations formulated under it, and the reasons for his action; and he further strongly recommended legislation by Congress:

"It rests with the wisdom of Congress to correct, improve, or enforce, this plan of procedure; *and it will probably be found expedient to extend the legal code and the jurisdiction of the courts of the United States to many cases which, though dependent on principles already recognized, demand some further provisions.*

"Where individuals shall, within the United States, array themselves in hostility against any of the Powers at war; or enter upon military expeditions or enterprises within the jurisdiction of the United States; or usurp and exercise judicial authority within the United States; or where the penalties on violations of the law of nations may have been indistinctly marked, or are inadequate; these offences cannot receive too early and close an attention, and require prompt and decisive remedies. . . ."

Within a month the necessity of a statutory curb on the granting of military commissions to United States citizens became even more evident through the receipt by the President of a copy of the proceedings of the Legislature of South Carolina, transmitting a committee report as to the levy of armed forces by persons under foreign authority. This report stated that five named citizens of South Carolina, and others unnamed, "*have received and accepted military commissions* from Mr. Genet . . . authorizing them and instructions requiring them, to raise, organise, train and conduct troops within the United States . . . to proceed into the Spanish dominions; . . . that the persons above named *in pursuance of the powers vested in them by the said commissions* . . . have proceeded . . . to enrol numbers of citizens of this State . . . in the service of the republic of France" The committee recommended that the governor issue a proclamation forbidding such acts; and also that the Attorney General prosecute such persons "for accepting or engaging to accept commissions from a foreign Power to raise troops within the United States, and for going about within the States levying or attempting to levy troops, and for seducing and endeavoring to seduce the citizens of this State to enrol themselves for foreign service to commit acts of hostility against nations with whom the United States are at peace." (*American State Papers, Foreign Relations*, Vol. I, p. 309.)

A proposed message by the President to Congress, transmitting this report, was drafted by Hamilton, as follows:

". . . a case has occurred, which is conceived to render further forbearance inconsistent with the dignity, and perhaps the safety of the United States. It is proved, as will be seen by papers now transmitted for the information of Congress, that this foreign agent has proceeded to the extraordinary lengths of *issuing commissions in the name of the French republic, to several of our citizens, for the purpose of raising within the two Carolinas and Georgia, a large military force*, with the declared design of employing them, in concert with such Indians as could be engaged in the enterprise, in an expedition against the colonies in our neighborhood, of a nation with whom the United States are at peace.

"It would seem, likewise, from information contained in other papers, herewith also communicated, that a similar attempt has been going on in another quarter, namely the State of Kentucky; though the fact is not yet ascertained with the requisite authenticity.

"Proceedings so unwarrantable, so derogatory to the sovereignty of the United States, so dangerous in precedent and tendency, appear to render it improper that the person chargeable with them should longer continue to exercise the functions and enjoy the privileges of a diplomatic character."

Washington, however, simply forwarded the papers to Congress, January 15, 1794, with no comment.

Genet evasively admitted that he had granted commissions.[1]

### THE ACT OF 1794.

A bill drafted by Hamilton, and intended to penalize infractions of neutrality, was introduced in the Senate February 12, 1794. (*Annals of Congress, 3rd Cong. 1793–1795.*) The very first section made it criminal to "accept or take any commission to serve a foreign Prince or State in war." The second section made criminal the enlisting and hiring of others to enlist. The third section made criminal the fitting out and arming of privateers and the issue or delivery of a commission for any such ship. The fourth was concerned with the increase of the force of any foreign warships. The fifth made criminal any military expedition from the United States. These sections, practically unchanged, constitute the present so-called Neutrality Laws of the United States (*Federal Penal Code*, secs. 9–13). It will be noted that each section dealt with a particular problem and form of violation of neutrality with which the United States Government had been confronted between May, 1793, and February, 1794. The language used by Congress is to be construed, therefore, in connection with the evils to which it was intended to apply, and

[1] See as to this, a graphic letter from Fisher Ames (then Congressman from Massachusetts) to T. Dwight, Jan. 17, 1794 (*Works of Fisher Ames*, Vol. I, p. 132).

with the events which gave rise to the statute. The bill passed the Senate March 13 by the casting vote of the Vice President, and was introduced in the House March 14. Before the House took action, however, the necessity became still clearer for the enactment of those sections penalizing the exercising of commissions to serve a foreign state, enlisting of men for foreign service and sending out of military expeditions from the United States.

An expedition against New Orleans had been set on foot in Kentucky under French auspices, and foreign commissions were issued to United States citizens in the fall of 1793. Spain had complained to this country, and Jefferson wrote, November 6, to the Governor of Kentucky (*American State Paper, Foreign Relations*, Vol. I, pp. 455–457):

"I have received from the representatives of Spain here, information, of which the following is the substance: That, on the 2d of October, four Frenchmen, of the names of La Chaise, Charles Delpeau, Mathurin, and Gignoux, set out in the stage from Philadelphia to Kentucky; that they were authorized by the minister of France here to excite and engage as many as they could, whether of our citizens or others, on the road or within your Government, or any where else, to undertake an expedition against the Spanish settlements within our neighborhood, and, in event, to descend the Ohio and Mississippi and attack New Orleans, where they expected some naval cooperation; that they were furnished with money for these purposes, and with blank commissions, to be filled up at their discretion. I enclose you the description of these four persons in the very words in which it has been communicated to me.

"Having laid this information before the President of the United States, I have it in charge from him to desire your particular attention to these persons, that they may not be permitted to excite within our territories, or carry from thence, any hostilities into the territory of Spain. For this purpose, it is more desirable that those peaceable means of coercion should be used which have been provided by the laws, such as the binding to the good behavior these, or any other persons exciting or engaging in these unlawful enterprises, indicting them, or resorting to such other legal process, as those learned in the laws of your State may desire. Where these fail, or are inadequate, a suppression by the militia of the State has been ordered and practised in the other States. I hope that the citizens of Kentucky will not be decoyed into any participation in these illegal enterprises against the peace of their country, by any effect they may expect from them on the navigation of the Mississippi."

The Governor replied January 13, 1794, doubting whether there was any authority to restrain citizens, saying:

"I have great doubts, even if they do attempt to carry their plan into execution, (provided they manage their business with prudence) whether there is any legal authority to restrain or punish them, at least before they have actually accomplished it: for, if it is lawful for any one citizen of this State to leave it, it is equally so for any number of them to do it. It is also lawful for them to carry with them any quantity of provisions, arms, and ammunition; and, if the act is lawful in itself, there is nothing but the particular intention with which it is done that can possibly make it unlawful; but I know of no law which inflicts a punishment on intention, only, or any criterion by which to decide what would be sufficient evidence of that intention, if it was a proper subject of legal censure."

The new Secretary of State, Edmund Randolph, replied March 29, 1794, stating:

". . . That foreigners should meddle in the affairs of a Government where they happen to be, has scarcely even been tolerated, and is often severely punished. That foreigners should point the force of a nation, against its will, to objects of hostility, is an invasion of its dignity, its tranquillity, and even safety. Upon no principle can the individuals on whom such guilt shall be fixed, bid the Government to wait, as your excellency would seem to suppose, until their numbers shall defy the ordinary animadversions of law; and until they are incapable of being subdued, but by force of arms. To prevent the extremity of crimes, is wise and humane, and steps of precaution have, therefore, been found in the laws of most societies.

"Nor is this offence of foreigners expiated or lessened by an appeal to a presumed right in the citizens of Kentucky to enlist under such banners without the approbation of their country. In a Government instituted for the happiness of the whole, with a clear delineation of the channels in which the authority derived from them must flow, can a part only of the citizens wrest the sword from the hands of those magistrates whom the whole have invested with the direction of the military power? They may, it is true, leave their country; they may take arms and provisions with them; but, if these acts be done, not on the ground of mere personal liberty, but of being retained in a foreign service, for purposes of enmity against other people, satisfaction will be demanded, and the State to which they belong cannot connive at their conduct, without hazarding a rupture."

The division of opinion which had thus arisen between the Governor and the Secretary of State as to legal authority to prevent the hostile actions caused the President to lay the whole correspondence before Congress, May 20, as evidence of the need of legislation. The House of Representatives responded by taking up Hamilton's bill for debate, May 31, June 2; and the bill passed June 2 and became

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